

1 The Honorable John C. Coughenour
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

10 NICLAS FOSTER, as Personal Representative
11 of the Estate of MEIKE FOSTER,

12 Plaintiff,

13 v.

14 AMERICAN HONDA MOTOR COMPANY,
15 INC., a foreign corporation; HONDA MOTOR
16 COMPANY, LTD., a foreign corporation;
17 HONDA NORTH AMERICA, INC., a foreign
18 corporation; HONDA OF CANADA
MANUFACTURING d/b/a HONDA OF
CANADA, INC., a foreign corporation;
HONDA R&D AMERICAS, INC., a foreign
corporation,

19 Defendants.

20 No. 17-cv-01727-JCC

21 DEFENDANTS' REPLY IN SUPPORT
22 OF MOTION TO EXCLUDE LATE
23 DISCLOSED SUPPLEMENTAL
24 REPORT/OPINIONS OF PLAINTIFF'S
25 RODENT EXPERT

26 NOTE ON MOTION CALENDAR:

FRIDAY, SEPTEMBER 6, 2019

I. INTRODUCTION

Defendants' motion to exclude should be granted because (1) Dr. Buczkowski (the witness at issue) did not include any opinions about alleged rodent activity in "this particular vehicle" in his formal, signed, January 14, 2019 report (Ex. A to Russell Dec.); (2) plaintiff's attorneys did not supplement Dr. Buczkowski's January 14, 2019 report at any time until June 26, 2019, the morning of their perpetuation of Dr. Buczkowski's trial testimony; and (3)

1 plaintiff's suggestion that Dr. Buczkowski's "this particular vehicle" opinions (on Ex. E to
 2 Russell Dec.) were not new opinions is demonstrably false.

3 **II. ARGUMENT**

4 **A. Dr. Buczkowski's January 14, 2019 Report Does Not Include Any "This Particular
 5 Vehicle" Opinions.**

6 Dr. Buczkowski prepared a formal, signed report (as required by Fed.R.Civ.P. 26(a)(2))
 7 on January 14, 2019.¹ *See* Ex. A to Russell Dec. On page 3 of his response to this Court,
 8 plaintiff tries to argue that there was nothing new in the opinions/notes that Dr. Buczkowski
 9 produced on June 26, 2019 (the morning of the perpetuation of his trial testimony) except "they
 10 reflect[ed] that the Indiana-based professor (1) had visited the fire scene in Kent the night prior
 11 to his deposition; (2) had looked at photographs of evergreen needles found during an inspection
 12 of the vehicle that occurred after his January 14, 2019, report; and (3) briefly looked at a number
 13 of incidents documented by Honda where Honda noted the presence of rodent nesting."²
 14 However, plaintiff's "nothing new" argument is demonstrably false. Even a cursory review of
 15 Dr. Buczkowski's January 14, 2019, signed, formal report will confirm that Dr. Buczkowski's
 16 properly disclosed opinions were all about the design of the 2012 Honda CR-V. *See* Ex. A to
 17 Russell Dec. at p. 3 ("it is my opinion that the space above undercarriage paneling on a 2012
 18 Honda CRV is an ideal rodent nesting habitat...."). Most importantly, nowhere is his January
 19 14, 2019 report did Dr. Buczkowski express any opinions about the presence or absence of
 20 rodent nesting activity in Ms. Foster's vehicle. As a result, it should be undisputed that Dr.
 21 Buczkowski's "this particular vehicle" opinions (*see* #3 on Ex. E to Russell Dec.) were entirely
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26 ¹ The report is dated January 14, 2018, but it was actually signed on January 14, 2019 and disclosed to the
 defendants on January 18, 2019.

² Plaintiff's Response at p. 3, lines 2-8.

1 new opinions of Dr. Buczkowski's and that they were not included in his January 14, 2019
 2 report. Also, it should be undisputed that Dr. Buczkowski's "this particular vehicle" opinions
 3 were never disclosed to the defendants at any time before the morning of plaintiff's perpetuation
 4 of Dr. Buczkowski's trial testimony on June 26, 2019. That is why defendants filed this
 5 motion—not for some improper tactical reason. And, whether some or all of the facts underlying
 6 Dr. Buczkowski's entirely new "this particular vehicle" opinions were known to the defendants
 7 before June 26, 2019, is a complete red herring. Having information about certain facts is
 8 completely different from learning—the day of the expert's trial testimony—that your
 9 opponent's expert will be relying upon those facts to express entirely new expert opinions.

11 **B. Plaintiff's Cited Cases Support Defendants' Motion.**

12 On page 8 of his response, plaintiff cites *Holiday Resales, Inc. v. Hartford Casualty*
 13 *Insurance Company*, 2008 WL 11343449 (W.D. Wash. October 2, 2008) as a case in which an
 14 expert was permitted to supplement his/her report 30 days before trial. However, that opinion
 15 (written by Judge Robart of this District) specifies that "[i]n filing a supplemental report, the
 16 party may not submit a report 'significantly different from the original reports and, in affect [sic],
 17 alter [] their theories.'" *Quoting Beller ex rel. Beller v. United States*, 221 F.R.D. 689, 695
 18 (D.N.M. 2003). Most importantly, Judge Robart held that "[n]or may a supplemental report
 19 contain 'additional opinions or rationales or seek[] to 'strengthen' or 'deepen opinions expressed
 20 in the original expert report.'" *Quoting Cook v. Rockwell Int'l Corp.*, 2006 WL 3533049, at *87
 21 (D. Colo. Dec. 7, 2006)(emphasis added). Given this legal standard, defendants' motion should
 22 be granted because (1) plaintiff did not supplement Dr. Buczkowski's report at all—let alone at
 23 least 30 days before plaintiff's perpetuation of his trial testimony; (2) that the rest of the trial in
 24 this matter will happen in early November is irrelevant to the timing of plaintiff's attempted

1 supplementation of Dr. Buczkowski's trial opinions the morning of *his* trial testimony; and (3) it
 2 should be undisputed that Dr. Buczkowski's "this particular vehicle" opinions were all
 3 "significantly different from [his] original report[]," which is improper—even if they had been
 4 served 30 days or more before Dr. Buczkowski's trial testimony.

5 Plaintiff's final argument is that defendants have failed to demonstrate that they were
 6 prejudiced by plaintiff's disclosure of entirely new expert opinions the morning of that expert's
 7 trial testimony. However, none of the cases cited by plaintiff in support of his prejudice
 8 argument are at all analogous to the facts before this Court. In the *Prager* case (cited by plaintiff
 9 on page 9 of his response), the Court denied defendant's motion because, in this plaintiff's
 10 words, "defendants were previously aware of [the] expert's opinion" at issue. And, in the *Gillum*
 11 case (also cited by plaintiff on page 9 of his response), the Court denied the motion because, in
 12 this plaintiff's words, "the expert was made available for a second deposition before [the]
 13 discovery deadline, thus, any prejudice accruing to the defendant from an inadequate opportunity
 14 to prepare for the first deposition was capable of being cured."³ It's critically important to
 15 remember that, in this case, Dr. Buczkowski's entirely new "this particular vehicle" opinions
 16 were disclosed to the defendants, for the first time, approximately four hours before plaintiff's
 17 perpetuation of Dr. Buczkowski's trial testimony. Given those facts, the undersigned had no
 18 time to consult with a defense expert or to research or investigate the strength or weakness of Dr.
 19 Buczkowski's "this particular vehicle" opinions. Such significant prejudice is exactly the point
 20 of Judge Robart's opinion in the *Holiday Resales* case cited above. Again, as Judge Robart held,
 21 even a supplemental expert report that is filed/served more than 30 days before the expert's trial
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³ Plaintiff's Response at pp. 9-10.

1 testimony may not “contain ‘additional opinions or rationales or seek[] to ‘strengthen’ or ‘deepen’
2 opinions expressed in the original expert report.’” *Quoting Cook v. Rockwell Int'l Corp.*, 2006
3 WL 3533049, at *87 (D. Colo. Dec. 7, 2006). Plaintiff’s disclosure of completely new “this
4 particular vehicle” opinions the morning of Dr. Buczkowski’s trial testimony violates the letter
5 and the spirit of Fed.R.Civ.P. 26(a)(3)(B) and (e)(2). Defendants’ motion to exclude should be
6 granted accordingly.
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8 DATED this 10 day of September, 2019.

9 KELLER ROHRBACK L.L.P.
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be served by CM/ECF or email, a true and correct copy of this document to:

Mr. Thomas J. Breen (WSBA #34574)

Mr. Peter O'Neil (WSBA #28198)

Ms. Kristin Houser (WSBA #7286)

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oneil@sgb-law.com

DATED at Seattle, Washington this 6 day of September, 2019.

Autumne L. Weingart
Autumne Weingart

4839-4560-9891, v. 1

DEFS' REPLY IN SUPPORT OF MOTION TO EXCLUDE LATE
DISCLOSED SUPPLEMENTAL REPORT/OPINIONS OF PL'S
RODENT EXPERT
(17-cv-01727-JCC) - 6

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